No. 12,493

IN THE

United States Court of Appeals

For the Ninth Circuit

J. GORDON TURNBULL, SVERNDRUP AND PARCEL and UNITED STATES FIDELITY AND GUARANTY COMPANY,

Appellants,

vs.

ALBERT J. CYR, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, FEDERAL SECURITY AGENCY and LOIS G. M. ROSS, alleged widow of Kenneth R. Ross, and JOHN GARY ROSS (a minor child),

Appellees.

APPELLANTS' OPENING BRIEF.

LEONARD, HANNA & BROPHY,
EDMUND D. LEONARD,
IVAN A. SCHWAB,
465 California Street, San Francisco 4, California,
Attorneys for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

Other Authorities

No. 12,493

IN THE

United States Court of Appeals

For the Ninth Circuit

J. GORDON TURNBULL, SVERNDRUP AND PARCEL and UNITED STATES FIDELITY AND GUARANTY COMPANY,

Appellants,

vs.

ALBERT J. CYR, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, FEDERAL SECURITY AGENCY and LOIS G. M. ROSS, alleged widow of Kenneth R. Ross, and JOHN GARY ROSS (a minor child),

Appellees.

APPELLANTS' OPENING BRIEF.

JURISDICTION.

Kenneth R. Ross was employed in the year 1943 by J. Gordon Turnbull and Sverndrup and Parcel, contractors on the Canol Project, a defense base project in the Yukon Territory in Canada, and United States Fidelity and Guaranty Company was the workmen's

compensation insurance carrier for said contractors. By compensation order dated April 26, 1946, the Deputy Commissioner for the United States Bureau of Employees' Compensation, Federal Security Agency, awarded benefits to Ross under the provisions of the Defense Bases Act (Act of August 16, 1941, 55 Stat. 622; Act of December 2, 1942, 56 Stat. 1035; 42 U.S. Code Secs. 1651-1654) which extended the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S. Code Secs. 901-950) to employees of contractors on defense base projects. The award of compensation benefits to Ross was made because of a tuberculous condition which originated during his period of employment in 1943, and compensation payments were made by the insurance carrier pursuant to said compensation order from October 27, 1943, to March 19, 1948.

Ross died on March 30, 1948, as the result of his tuberculosis. On April 26, 1948, Lois G. M. Ross filed an application for death benefits under the Longshoremen's and Harbor Workers' Compensation Act as extended by the Defense Bases Act with the Deputy Commissioner for the Thirteenth Compensation District, Bureau of Employees' Compensation, Federal Security Agency, at his office in San Francisco, California, in which said Lois G. M. Ross set forth the claim that she was the widow of Kenneth R. Ross and that he also left surviving him a son, John Gary Ross, born September 2, 1947 (Tr. 24). A hearing was held on said claim before the Deputy Commissioner at Denver, Colorado, on June 15, 1949

(Tr. 29) and thereafter, on July 8, 1948, Appellee Albert J. Cyr, as Deputy Commissioner, filed in his office (which office is located in San Francisco, California) and served upon the parties a Compensation Order—Award of Death Benefits. (Tr. 26.) Within the time allowed by law and pursuant to the provisions of Section 3(b) of the Defense Bases Act (Act of August 16, 1941, Sec. 3(b), 55 Stat. 623, 42 U.S. Code 1653) and Section 21 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S. Code, 921), appellants filed their complaint for injunction against the enforcement of the order in the United States District Court, Northern District of California, Southern Division, contending that the Compensation Order—Award of Death Benefits was not in accordance with law. (Tr. 2.)

On December 27, 1949, the Honorable Dal M. Lemmon, district judge, made and filed an order dismissing the complaint for injunction. (Tr. 19, 20.) Notice of appeal was filed February 17, 1950 (Tr. 20, 21), within the time allowed by law. (28 U.S. Code 2107.) Cost bond on appeal was also filed on February 17, 1950.

Jurisdiction of this Court upon appeal is invoked under 28 U.S. Code 1291.

STATEMENT OF THE CASE.

Kenneth R. Ross received compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, as extended by the Defense Bases

compensation insurance carrier for said contractors. By compensation order dated April 26, 1946, the Deputy Commissioner for the United States Bureau of Employees' Compensation, Federal Security Agency, awarded benefits to Ross under the provisions of the Defense Bases Act (Act of August 16, 1941, 55 Stat. 622; Act of December 2, 1942, 56 Stat. 1035; 42 U.S. Code Secs. 1651-1654) which extended the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S. Code Secs. 901-950) to employees of contractors on defense base projects. The award of compensation benefits to Ross was made because of a tuberculous condition which originated during his period of employment in 1943, and compensation payments were made by the insurance carrier pursuant to said compensation order from October 27, 1943, to March 19, 1948.

Ross died on March 30, 1948, as the result of his tuberculosis. On April 26, 1948, Lois G. M. Ross filed an application for death benefits under the Longshoremen's and Harbor Workers' Compensation Act as extended by the Defense Bases Act with the Deputy Commissioner for the Thirteenth Compensation District, Bureau of Employees' Compensation, Federal Security Agency, at his office in San Francisco, California, in which said Lois G. M. Ross set forth the claim that she was the widow of Kenneth R. Ross and that he also left surviving him a son, John Gary Ross, born September 2, 1947 (Tr. 24). A hearing was held on said claim before the Deputy Commissioner at Denver, Colorado, on June 15, 1949

(Tr. 29) and thereafter, on July 8, 1948, Appellee Albert J. Cyr, as Deputy Commissioner, filed in his office (which office is located in San Francisco, California) and served upon the parties a Compensation Order—Award of Death Benefits. (Tr. 26.) Within the time allowed by law and pursuant to the provisions of Section 3(b) of the Defense Bases Act (Act of August 16, 1941, Sec. 3(b), 55 Stat. 623, 42 U.S. Code 1653) and Section 21 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S. Code, 921), appellants filed their complaint for injunction against the enforcement of the order in the United States District Court, Northern District of California, Southern Division, contending that the Compensation Order—Award of Death Benefits was not in accordance with law. (Tr. 2.)

On December 27, 1949, the Honorable Dal M. Lemmon, district judge, made and filed an order dismissing the complaint for injunction. (Tr. 19, 20.) Notice of appeal was filed February 17, 1950 (Tr. 20, 21), within the time allowed by law. (28 U.S. Code 2107.) Cost bond on appeal was also filed on February 17, 1950.

Jurisdiction of this Court upon appeal is invoked under 28 U.S. Code 1291.

STATEMENT OF THE CASE.

Kenneth R. Ross received compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, as extended by the Defense Bases

Act, from October 27, 1943, to March 19, 1948, because of a tuberculous condition contracted while he was employed on a defense base project in Yukon Territory, Canada. (Tr. 30.) Kenneth R. Ross died from tuberculosis on March 30, 1948. (Tr. 41.) On April 26, 1948, Lois G. M. Ross filed a claim with the Deputy Commissioner, Thirteenth Compensation District, Bureau of Employees' Compensation, Federal Security Agency, which was verified by Lois G. M. Ross before a notary public in Denver, Colorado, on April 19, 1948. (Tr. 24, 25.) In said claim, Lois G. M. Ross set forth that she was the widow of Kenneth R. Ross, the claim stating: "Widow was married to the deceased on 5th day of October, 1946 at Tiajuana, Mexico by Justice of the Peace." (Tr. 24.) The claim also set forth that the deceased was survived by a child, John Gary Ross, born September 2, 1947. (Tr. 24.) At a hearing held by the Deputy Commissioner in Denver, Colorado, on June 15, 1948 (Tr. 29), Lois G. M. Ross testified that the statement made under oath in the claim that a marriage ceremony was performed by a justice of the peace on October 5, 1946, was incorrect (Tr. 43) and that she and Kenneth R. Ross had never gone through any marriage ceremony. (Tr. 44.) She further testified that she first became acquainted with Mr. Ross when he was in the hospital in Canada receiving treatment for his tuberculosis (Tr. 45); that after Mr. Ross had moved to California, she came to see him there and commenced living with him in California in October, 1946 (Tr. 44); that she continued to live with Mr. Ross from that

time until his death in March, 1948 (Tr. 45); that she and Mr. Ross moved from California to Colorado in June, 1947, and lived together in Colorado Springs and later in Denver (Tr. 46); that she was the mother and Kenneth Ross the father of John Gary Ross, who was born in Denver, Colorado, on September 2, 1947. (Tr. 32.)

By Compensation Order—Award of Death Benefits dated July 8, 1948, the Deputy Commissioner made findings that Lois G. M. Ross "is the widow of the deceased herein by virtue of a common-law marriage contracted in the State of Colorado and is entitled to death benefit of $13.13 a week beginning with March 30, 1948", and that John Gary Ross "is the minor son of Kenneth Ross and Lois G. M. Ross and is entitled to a benefit of $3.75 a week beginning with March 30, 1948". (Tr. 27.)

SPECIFICATIONS OF ERROR.

I.

That the District Court erred in granting the motion to dismiss the complaint for an injunction against the enforcement of the Compensation Order—Award of Death Benefit entered by the appellee Cyr because said Compensation Order—Award of Death Benefit was not in accordance with law in that there was no substantial evidence in the proceedings before appellee Cyr to support the finding that the claimant Lois G. M. Ross is the widow of the deceased em-

ployee by virtue of a common-law marriage contracted in the State of Colorado.

II.

That the District Court also erred in granting the motion to dismiss because said Compensation Order—Award of Death Benefit was not in accordance with law in that the claimant Lois G. M. Ross is not included in the class of persons entitled to payment of a death benefit under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. Code 901 et seq.) and the Defense Bases Act (42 U. S. Code 1651-1654).

III.

That the District Court also erred in granting the motion to dismiss because said Compensation Order—Award of Death Benefit was not in accordance with law in that the claimant John Gary Ross is not included in the class of persons entitled to payment of a death benefit under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. Code 901 et seq.) and the Defense Bases Act (42 U. S. Code 1651-1654).

ARGUMENT.

I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING THAT THE CLAIMANT LOIS G. M. ROSS IS THE WIDOW OF THE DECEASED EMPLOYEE BY VIRTUE OF A COMMON-LAW MARRIAGE CONTRACTED IN COLORADO.

The record shows that Lois G. M. Ross and Kenneth R. Ross began living together in California in October, 1946, and continued to live together in that state until June, 1947. She did not acquire the status of a wife by this conduct, for it is well established that there is no such thing as a common-law marriage in California. (*Norman v. Norman,* 121 Cal. 620, 54 Pac. 143; 1 *Vernier, American Family Laws,* p. 106.) There can be no question but what the relationship of the parties during their stay in California was wholly illegal, which was quite apparently recognized by Lois G. M. Ross, since she falsely set forth in her verified claim an allegation that a marriage ceremony had been performed in Tiajuana, Mexico.

There are many cases that hold a relationship which is meretricious in its inception will be presumed so to continue even after a bar to a legal marriage has been removed. (*Sebree v. Sebree,* 293 Ill. 228, 127 N.E. 392; *Clark v. Barney,* 24 Okla. 455, 103 Pac. 598.) And it is well settled that mere cohabitation after the removal of the impediment is not sufficient to show a lawful marriage. (*McConnell v. McConnell,* 211 Mich. 483, 179 N.W. 33; *Lanham v. Lanham,* 136 Wis. 360, 117 N.W. 787; *Mayes v. Mayes,* 84 Ind. App. 90, 147 N.E. 630.) We submit that this principle is applicable here

and that evidence which, taken in its entirety, establishes nothing except that Lois G. M. Ross and Kenneth R. Ross continued to live together in Colorado after going there from California, representing themselves to the public as being husband and wife, is insufficient to support a finding that a valid common-law marriage was contracted in Colorado.

In the instant case, Lois G. M. Ross was a mature woman of 25 years of age when she commenced living with Kenneth R. Ross. She must be presumed to have known that under the law of California the relationship into which she was entering was an illicit one. That she in fact knew that the law of California required a ceremony for a valid marriage is further indicated by the fact that she asserted in her claim for compensation that there had been a marriage ceremony and by her testimony that when the subject was discussed with Kenneth R. Ross, "He said we would go to Mexico and get married." (Tr. 52.) The facts in this case require application of the rule set forth in the cases cited above and readily distinguish it from those cases that have reached a contrary result where the relationship was innocent in its inception and was entered into under a mistaken belief that a valid ceremony had been performed.

It is true that the record shows that declarations were made by Lois G. M. Ross and Kenneth R. Ross to the effect that they were husband and wife, which declarations found their way into hospital records, and birth and death certificates, and that representations

were made to their landlady and to trades people that they were Mr. and Mrs. Ross. But this evidence, when considered in conjunction with the evidence that the parties had lived together in the same manner previously in California, is not sufficient to establish that a common-law marriage was entered into in Colorado. As observed by one eminent authority:

> "Nor is the issue between informal marriage and illicit intercourse to be concluded by the conduct of the pair towards society. They may, for convenience or decency's sake, hold themselves out to third persons as man and wife, while yet sustaining at law, and intentionally, a purely meretricious relation."
>
> II *Schouler on Marriage and Divorce* (Sixth Edition), page 1439.

The modern tendency of the Courts is to look with disfavor upon claims depending for their validity upon the establishment of a common-law marriage, and to require very strong proof before holding that a valid common-law marriage has been contracted. There has been a recognition of the fact that the conditions which originally prompted Courts to recognize common-law marriages as valid have now disappeared, and that to continue to recognize such claims is to run counter to the purposes sought to be accomplished by more modern legislation respecting marriage. The modern tendency has been well stated by the Supreme Court of the State of Florida, as follows:

> "Because of the intrinsic importance to democratic government, and to society itself, of the

institution of marriage, much has been written by the courts of the land on the subject of those unions contracted without ceremony. The law universally condemns cohabitation without the bounds of wedlock and every effort has been made by the state and federal law makers to discourage and thwart it. By such precautions the very foundation of society, the home, has been safeguarded; the destructive results of promiscuity such as illegitimacy and tangled property rights have at least been curtailed.

"To lend dignity and solemnity to the marriage venture the law provides that it be inaugurated by a minister of the gospel, a judicial officer or a notary public. Despite the formalities required and the obvious importance of them some of the states recognize a marriage without ceremony. Many of them, however, have either abolished this form of contract or have refused to countenance it in the first instance, but it is approved or tolerated in Florida. Thus as Mr. Chief Justice Terrell points out in Le Blanc v. Yawn, supra [99 Fla. 328, 126 So. 791], an anomaly of the first degree is apparent for 'common-law * * * marriages were not recognized in the Colonies, and were abolished in the mother country [source of our common law] prior to the Revolution.'

"The thought that there may have been at one stage of the development of this country reasons for entering the marriage contract without the performance of any rite is suggested by an opinion of one of the Civil Courts of Appeals of Texas, McChesney v. Johnson, 79 S.W. 2d 658. It was commented in that decision that sparseness of

settlements, difficulty of travel, inaccessibility of ministers or officers given the right to perform the ceremony and unfamiliarity, through illiteracy, furnished some justification for dispensing with the formal marriage vows.

"The same considerations, of course, applied to Florida as it progressed from infancy to its present state of development. These conditions, however, do not now obtain. Distances to cities have shrunk because of modern methods of travel; a network of improved roads and arterial highways has made county seats, cities and towns accessible to nearly every dweller; churches have been established galore; and a school system furnishes the advantages of education even to the slothful. Why, then, should the common-law marriage be given the same recognition and dignity now that Florida has emerged from the status of a frontier? We can give no logical reason and although we will not attempt to abolish it by judicial fiat we will examine the evidence of such transactions with increasing caution for as the reasons for making informally a contract of such moment become more obscure so should the effort to establish it grow more difficult. This seems harmonious with the trend of late decisions and modern thought toward the abolition of consensual marriage."

McClish v. Rankin, 153 Fla. 324, 14 So. (2d) 714, 717.

The Texas Court, in reaching a conclusion similar to that of the Florida Court as set forth above, made the following pertinent observations:

"We do not say that all of the reasons for upholding common-law marriages have disappeared.

> We do say that the courts should review with care a common-law marriage claimed to have been contracted in the shadow of the county clerk's office and within the sound of church bells."
>
> *McChesney v. Johnson,* Tex. Civ. App. 79 S.W. (2d) 658.

Text writers also have recognized the modern tendency to require strong proof before recognizing the validity of a common-law marriage. As early as 1923, a writer in the Oregon Law Review observed:

> "Whether or not, by the spread of education and the facility for celebrating marriages without great expense and delay, we have yet reached the point where it is no longer necessary or desirable to recognize these informal marriages, is of course a debatable question. The modern trend, both in England and in this country, judging from the legislative enactments in relation thereto, would seem to be away from the common-law marriage, and the 'malodorous brood' of cases which arise therefrom.
>
> "There is a growing tendency in this country to improve the condition of the race by various statutory regulations concerning marriage. Certain states, for example Wisconsin, prohibit the marriage of the physically diseased. Other states also prohibit the marriage of the mentally unfit. Some of the states have passed so-called eugenic laws, under the provisions of which, marriage licenses are refused to those who do not present proper medical certificates showing that they are free from certain diseases. The practicability of

such laws may be questioned, but their purpose is undoubtedly most praiseworthy, and they have been held constitutional, even though applicable to men only, and also even when the physician's fee for the physical examination is arbitrarily limited to a certain amount. Obviously all such laws would be totally ineffective if licenses to marry were not necessary, and parties could freely marry simply by an agreement between themselves."

3 *Oregon Law Review* 28, 47.

Keezer, in the most recent edition of his work, says:

"Common-law marriage furnishes a means of defeating the effectiveness of reforms sought to be brought about through legislation. Laws requiring premarital physical examination are rendered ineffective. It cheapens marriage and gives instability to the home."

Keezer, Marriage & Divorce (3d Ed.) p. 59.

Colorado now has a statutory requirement for premarital physical examinations showing the parties to be free from venereal disease before a marriage license can be issued. (4 Colorado Statutes Annotated Ch. 107, Sec. 5(d).) This change in the statutory requirements respecting marriage was made in 1939. (Laws 1939, p. 455.) Diligent search has been made by counsel for appellants, but no Colorado decision has been found upholding the validity of a common-law marriage alleged to have been contracted since the 1939 change in the statutory requirements. For this Court to uphold the finding that a valid common-

law marriage was contracted in Colorado, upon the extremely weak record here presented, would amount to striking down by indirection the statute establishing the present policy of the state respecting the requirements for a valid marriage.

II.

EVEN IF IT BE CONCEDED THAT A COMMON-LAW MARRIAGE WAS CONTRACTED, THE CLAIMANT LOIS G. M. ROSS IS NOT INCLUDED IN THE CLASS OF PERSONS ENTITLED TO PAYMENT OF A DEATH BENEFIT.

Appellants contend that neither Lois G. M. Ross nor John Gary Ross were entitled to an award for death benefit because the statute provides that conditions as they exist at the time of injury, and not at the time of death, determine the persons entitled to a death benefit. Section 9 of the Longshoremen's and Harbor Workers' Act (33 U.S.C.A. 909) provides in its inception: "If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to and for the benefit of the persons following:". The section then has a number of sub-sections specifying the relatives entitled to a death benefit, the amount payable under various conditions and other provisions with respect to the payment of the death benefit. Sub-section (f) reads as follows: "All questions of dependency shall be determined as of the time of the injury."

We submit that the language of the statute, when given its common, ordinary meaning and when the

purposes sought to be accomplished are considered, requires that the question of whether Lois G. M. Ross and John Gary Ross are entitled to a death benefit must be decided upon the basis of conditions as they existed at the time of injury. The time of injury in this case was the period of employment from April 27, 1943, until October 27, 1943. At that time, Lois G. M. Ross was a stranger to the deceased employee, and John Gary Ross had not been conceived and was not in being. The earliest possible date at which Lois G. M. Ross could contend she acquired the status of a common-law wife is June, 1947, when she and the deceased employee removed from California to Colorado. That date was approximately four years after the date of injury, and the contention that a status acquired as of that late date entitles the claimant to an award for a death benefit is entirely inconsistent with the fundamental purpose of compensation laws to safeguard employees and those dependent upon their salaries for a living against loss of earning capacity as the result of injury.

The illogic of such a contention has been well stated in the Utah case of *Sarich v. Industrial Commission,* 64 Utah 17, 227 Pac. 1039. In that case, a woman married an injured employee ten days after the date of injury, while he was in a hospital with no hope of recovery from the effects of his injury. He died ten days after the marriage ceremony was performed. In refusing to allow an award to the widow, the Court made the following observations:

"Plaintiff married deceased at a time when he was mortally injured and without hope of recovery. Deceased was thus not only in a helpless physical condition at the time of the marriage, but was utterly without hope of ever being in any other condition. He was not earning a farthing at the time of or after the marriage that could have been devoted to the support of the plaintiff. Indeed, he was a helpless burden upon her. The whole theory and basis of our Industrial Act is that the claimant has been deprived of tangible support by reason of the injury and death of the deceased employee.

* * * * * * *

"Can plaintiff, by the mere act of marriage, therefore, convert a burden into a benefit? Can she, by her own act, create a dependency which did not and could not exist as a matter of fact? Can she, by merely creating the naked relation of husband and wife, claim the benefits of a most beneficent law which was intended to protect those who in truth and in fact were dependent upon the earnings of a deceased employe whose death resulted from an injury in the course of his employment? To permit plaintiff to recover in this case would result not only in a travesty of justice but would inevitably result in casting suspicion if not reproach upon a most just and beneficent statute."

The respondent Deputy Commissioner, when this case was before the District Court, contended that the provisions of Section 9(f) of the Longshoremen's and Harbor Workers' Compensation Act, that questions of dependency are to be determined as of the

time of injury, should not be applied in this case because, it was argued, the allowance of a death benefit to a wife and child does not involve a "question of dependency."

It was the contention of the Deputy Commissioner that the mere existence of the status of husband and wife, or father and child, at the time of the employee's death is sufficient to justify the award of a death benefit, and that the status in either event need not have existed at the time of injury. The contention that a wife or child is to receive a death benefit for some unexplained reason other than dependency on the earnings of the employee which are destroyed by his injury is based on what we believe to be an improper concept of the fundamental purpose of any compensation act.

The deputy commissioner cited a 1916 decision of an intermediate Appellate Court in the State of New York (*Crocket v. International Railway Company,* 176 App. Div. 45, 162 N.Y.S. 357), and *Maryland Drydock Co. v. Parker, Deputy Commissioner,* 37 F. Supp. 717, in support of his contention. In our opinion, the reasoning adopted by the New York Court in the first case cited is unsound and should not be followed, and we do not believe that the *Maryland Drydock Co.* case is inconsistent with our contention in the present case.

Many compensation laws provide that a surviving wife and minor children shall be conclusively presumed to be dependent upon a deceased employee.

Maryland Drydock Co. v. Parker, 37 F. Supp. 717, goes no further than to say that the Longshoremen's and Harbor Workers' Compensation Act should be interpreted as establishing a similar conclusive presumption of dependency in favor of the surviving wife and children. In that case, the deceased employee had been divorced and his wife had remarried. At the time of injury, the children were being supported by their stepfather. The district judge stated the question to be decided in the following language: "The sole question is whether the minor children are, by the provisions of the statute, proper beneficiaries of the award. The employer claims that they are not, because not *dependents in fact* upon their father, the deceased employee, at the time of his death. The Deputy Commissioner held that dependency in fact was not a prerequisite, *but was presumed.*" (Emphasis added.) The district judge then stated his decision as follows: "We find that the position taken by the Deputy Commissioner is sound, and that therefore the award must be affirmed."

As stated above, we believe that the decision of the Appellate Division, Supreme Court, of the State of New York, in *Crocket v. International Railway Company,* 176 App.Div. 45, 162 N.Y.S. 357, is unsound and should not be followed by this Court. Indeed, a study of other New York cases indicates that it is by no means established with any degree of certainty in that state that a wife's right to a death benefit does not involve a question of dependency. The point involved in the *Crocket* case has never been presented

to the highest Court in the State of New York. Furthermore, that decision was followed by another decision of the same Court that laid emphasis upon the presumption of dependency as the basis for an award to children of a deceased employee. *Crocket v. International Railway Company* was decided by the Third Department of the Appellate Division on December 28, 1916. A few months later, on March 7, 1917, the same department decided *Bell v. Terry & Tench Company,* 177 App. Div. 123, 163 N.Y.S. 733. Four of the five judges who participated in the decision of *Crocket v. International Railway Company* also participated in the decision of *Bell v. Terry & Tench Company.* The latter case held that illegitimate children were not entitled to a death benefit under the New York Compensation Act. In the course of its opinion, the Court stated:

> "Section 16 of the act provides that, 'if there be surviving child or children of the deceased under the age of eighteen years,' an additional amount shall be provided for such child or children until such child or children arrive at the age of 18 years, and this without reference to whether the children are dependent upon the father or not. In other words, *the statute presumes that the children of a parent are dependent upon him or her up to the age of 18 years,* and provides for them in the Compensation Law." (Emphasis added.)

On the very day that the Appellate Division decided *Crocket v. International Railway Company,* namely, December 28, 1916, the highest Court in New York

State decided *Shanahan v. Monarch Engineering Co.*, 219 N.Y. 469, 114 N.E. 795. In that case, a deceased employee left no widow or other relatives entitled to a death benefit under the Compensation Act. Brothers and sisters of the deceased employee who were not dependents sought to bring an action for wrongful death against the employer. The Court held that the Compensation Act furnished an exclusive remedy and that the action could not be maintained. The Court stated that the Compensation Act was passed for the "purpose of providing compensation for those who had a right to rely upon the support of the deceased employee." The opinion is replete with references to the right of *dependents* to recover a death benefit under the Compensation Act and nowhere in the opinion is there any indication that the Court considered the right to a death benefit as being anything else than a right founded upon a claim of dependency.

In view of the unsettled state of the New York law, and of the illogic of the result reached in *Crocket v. International Railway Company,* we submit that this Court should not follow that decision in interpreting Section 9(f) of the Longshoremen's and Harbor Workers' Compensation Act.

If dependency of a wife and minor children is presumed, then it logically follows that the question of who is a wife and who is a child presents a question of dependency, which must be determined as of the time of injury, in view of the provisions of Section 9(f) of the Act, which so provides.

The wording of other sections of the Act lends support to this interpretation. Section 2 (12) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S. Code 902) defines "compensation" as follows: "'Compensation' means the money allowance payable to an employee *or to his dependents* as provided for in this Act, and includes funeral benefits provided therein." (Emphasis added.) Section 9(g), which immediately follows the subsection requiring interpretation in this matter, reads: "Aliens: Compensation under this chapter to aliens not residents (or about to become non-residents) of the United States or Canada shall be the same in amount as provided for residents, except that *dependents* in any foreign country shall be limited to surviving wife and child or children, * * *." If a surviving wife and child in a foreign country are regarded as dependents, are not resident wives and children also dependents?

Again, Section 14 (1) of the Act (33 U.S. Code 914 (1)) provides:

> "An injured employee or in case of death his dependents or personal representative, shall give receipt for payment of compensation to the employer paying the same, and such employer shall produce the same for inspection by the deputy commissioner whenever required."

If the widow and children are not dependents, Section 14 (1) would have the absurd result of requiring that the injured employee must give a receipt for compensation received and, likewise, his parents, brothers, sisters, and grandchildren must give re-

ceipts, but his widow and children are not required to give receipts.

The deputy commissioner advanced one further argument in the District Court that requires consideration. He argued that the word "injury" is defined in Section 2 of the Act to mean "accidental injury or death" and that, therefore, dependency is to be determined as of the time of death, since "injury" is defined in the disjunctive to mean either "accidental injury" or "death." It is obvious that Section (f) was inserted in the Act in recognition of the fact that where an injury did not immediately result in death, cases would be presented requiring a decision as to whether a death benefit should be allowed on the basis of conditions as they existed at the time of injury or on the basis of conditions as they existed at the time of death. The purpose of inserting Section 9(f) in the Act was to remove any uncertainty on this point. We submit that the word "injury" was not used as a term of art and should be given its ordinary meaning, for to adopt the interpretation urged by the deputy commissioner would be to make it uncertain which date should be taken and would destroy the very purpose for which the provision was inserted in the statute. To say that the statute requires questions of dependency to be decided as of the date of death would lead to harsh results in many cases. For example, let us assume that an injured employee had aged parents who were partially dependent upon him for support at the time

of injury. Let us also assume that he lived for two years before he died as a result of the injury and that as he had only his compensation payments on which to live, his mother obtained part-time employment which enabled the parents to become wholly self-supporting. It would be a strange perversion of the spirit and purpose of the Act to say the parents were not entitled to a death benefit because "injury" means "death" and they were self-supporting as of the time of death.

A study of the legislative history of the Longshoremen's and Harbor Workers' Compensation Act, and of the decisions of the United States Supreme Court respecting the constitutionality of that act and of state compensation acts, shows throughout a recognition of the purpose of such acts to provide for dependents who were supported by the employee at the time of his injury. The House Committee report on the Longshoremen's and Harbor Workers' Compensation Act contained this statement:

> "Workmen's Compensation has come to be universally recognized as a necessity in the interest of social justice between employer and employee. It is the modern substitute for the old common-law remedy afforded through actions at law for damages, and promptly affords relief to the injured employee by furnishing medical attendance and supplies immediately upon the occurrence of the injury or as soon thereafter as possible and compensation during the period of his illness or inability to pursue his usual employment, *and in case of death, financial assistance to his de-*

pendents, without the delay and expense which an action at law entails."

* * * * * * *

"The bill as amended, therefore, will enable Congress to discharge its obligation to the maritime workers placed under their jurisdiction by the Constitution of the United States by providing for them a law whereby they may receive the benefits of workmen's compensation and thus afford them the same remedies that have been provided by legislation for those killed or injured in the course of their employment in nearly every State in the Union." (Emphasis ours.)

House of Representatives Report No. 1767, 69th Congress, 2d. Session (1927), pages 19 to 20;

House Reports, 69th Cong. 2d. Sess. Volume 1.

It is hard to square this declared purpose of Congress that "in case of death financial assistance to his dependents" should be supplied with the contention advanced by the deputy commissioner that in this case a death benefit is to be granted entirely without reference to the statutory requirements respecting dependency.

The decisions of the United States Supreme Court passing on the constitutionality of state compensation statutes are also enlightening. In these decisions, the fundamental purpose of providing for dependents who looked to the employee for support through his wages at the time of his injury is recognized as a keystone of such laws.

"Provision is universally made in workmen's compensation acts for compensation not only to disabled employees, but to the dependents of those whose injuries are fatal. And the two kinds of payment or 'always regarded as component parts of a single system of rights and liabilities arising out of' the relation of employer and employee. Western Metal Supply Co. v. Pillsbury, supra. The objects of such acts 'is single,—to provide for the liability of the employer to make compensation for injuries received by an employee,' whether to the employee himself or to those who suffer pecuniary loss by reason of his death. Huyett v. Pennsylvania R. Co., 86 N.J.L. 683, 684, 92 Atl. 58.

"This court has, in several cases, sustained the constitutionality of workmen's compensation acts, from which the California act, in its constitutional aspects, is not distinguishable, establishing exclusive systems governing the liabilities of employers in hazardous occupations in respect to compensation for industrial accidents to employees, resulting in disability or death, and requiring compensation to be paid to a disabled employee or to his surviving dependents in accordance with prescribed scales, gauged upon the previous wage and the extent of the disability or dependency. New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, L.R.A. 1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N.C.C.A. 943; Mountain Timber Co. v. Washington, 243 U.S. 219, 61 L. ed. 685, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N.C.C.A. 927; Ward & Gow v. Krinsky, 259 U.S. 503, 66 L.ed. 1033, 28 A.L.R. ....., 42 Sup. Ct. Rep. 529. And see Arizona Em-

ployers' Liability Cases (Arizona Copper Co. v. Hammer), 250 U.S. 400, 63 L. ed. 1058, 6 A.L.R. 1573, 39 Sup. Ct. Rep. 553. These acts were sustained in their entirety, without any separate reference to the status of the defendants (although in the White Case the right of a widow to compensation was directly involved), upon the broad ground that the state, by reason of its public interest in the safety and lives of employees engaged in such occupations, may provide, in the just and reasonable exercise of its police power, that the loss of earning power sustained by an employee through an industrial accident resulting in his disability or death, constituting a loss arising out of the business and an expense of its operation, shall, in effect, be charged against the industry after the manner of casualty insurance, and to that end require the employer to make such compensation as may reasonably be prescribed for the loss thus incurred in the common enterprise, irrespective of the question of negligence, to the injured employee or to his surviving dependents. New York C. R. Co. v. White (supra, pp. 203, 207); Mountain Timber Co. v. Washington (supra p. 243); Ward & Gow v. Krinsky (supra, p. 512). That is to say, as shown by these decisions, the compensation to dependents is merely a part of the general scheme of compensation provided by these acts for the loss resulting from the impairment or destruction of the earning power of an employee, caused by an industrial accident, which, in case of his death, is paid to those whom he had supported by his earnings and who have suffered direct loss through the destruction of his earnings power. And it is clear that the underlying reason

of these decisions applies alike to all dependents who, by his death, have been deprived of their support, whether they be residents or nonresidents of the state."

Madera Sugar Pine Co. v. Industrial Accident Commission of California, 262 U.S. 499, at 501-503, 67 L.ed. 1091, at 1093-1094.

"Briefly, *the statute* imposes liability upon the employer to make compensation for disability or death of the employee resulting from accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause except where the injury or death is occasioned by the employee's wilful intention to produce it, or where the injury results solely from his intoxication while on duty; it graduates the compensation for disability according to a prescribed scale based upon the loss of earning power, having regard to the previous wage and the character and duration of the disability; and *measures the death benefits according to the dependency of the surviving wife,* husband, or infant children." (Emphasis added.)

New York Central R. Co. v. White, 243 U.S. 188, at 202, 203, 205, 61 L. ed. 667, at 674.

In holding the Longshoremen's Act to be constitutional, the Supreme Court has specifically predicated its holding upon its former decisions in *New York Central R. Co. v. White,* and *Madera Sugar Pine Co. v. Ind. Acc. Com. of Calif.,* supra, and the entire line of cases in which it had previously sustained the constitutionality of the various state statutes.

"The propriety of providing by Federal statute for compensation of employees in such cases had been expressly recognized by this Court, and within its sphere the statute was designed to accomplish the same general purpose as the workmen's compensation laws of the States. In defining substantive rights, the Act provides for recovery in the absence of fault, classifies disabilities resulting from injuries, fixes the range of compensation in case of disability or death, and designates the classes of beneficiaries. In view of Federal power to alter and revise the maritime law, there appears to be no room for objection on constitutional grounds to the creation of these rights, unless it can be found in the due process clause of the 5th Amendment. But it cannot be said that either the classifications of the statute or the extent of the compensation provided are unreasonable. In view of the difficulties which inhere in the ascertainment of actual damages, the Congress was entitled to provide for the payment of amounts which would reasonably approximate the probable damages. See Chicago, B. & Q. R. Co. v. Cram, 228 U.S. 70, 84, 57 L. ed. 734, 740, 33 S. Ct. 437; compare Missouri P. R. Co. v. Tucker, 230 U.S. 346, 348; 57 L. ed. 1509, 1510, 33 S. Ct. 961. Liability without fault is not unknown to the maritime law, and, apart from this fact, considerations are applicable to the substantive provisions of this legislation, with respect to the relation of master and servant, similar to those which this Court has found sufficient to sustain workmen's compensation laws of the States against objections under the due process clause of the 14th Amendment. New York C. R. Co. v. White, 243 U. S. 188, 61

L. ed. 667, L.R.A. 1917D, 1, 37 S. Ct. 247, Ann. Cas. 1917D, 629, 13 N.C.C.A. 943; Mountain Timber Co. v. Washington, 243 U.S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642, 13 N.C. C.A. 927; Ward & Gow v. Krinsky, 259 U.S. 503, 66 L. ed. 1033, 28 A.L.R. 1207, 42 S. Ct. 529; Lower Vein Coal Co. v. Industrial Bd. 255 U.S. 144, 65 L. ed. 555, 41 S. Ct. 252; Madera Sugar Pine Co. v. Industrial Acci. Commission, 262 U.S. 499, 501, 502, 67 L. ed. 1091, 1093, 1094, 43 S. Ct. 604; R. E. Sheehan Co. v. Shuler, 265 U.S. 371, 68 L. ed 1061, 35 A.L.R. 1056, 44 S. Ct. 548; Dahlstrom Metallic Door Co. v. Industrial Bd. 284 U.S. 594, ante, 511, 52 S. Ct. 202. See Nogueira v. New York, N. H. & H. R. Co., supra (281 U. S. pp. 136, 137, 74 L. ed. 759, 760, 50 S. Ct. 303)."

Crowell v. Benson, 285 U.S. 22, at 40-42, 76 L. ed. 598, at 606-608.

It is, we respectfully submit, totally inconsistent with this uniform line of decisions by the Supreme Court to hold that a wife who acquired that status subsequent to the date of injury, who has suffered no loss of support by reason of the injury and who was a total stranger to the injured employee during his period of employment, is entitled to an award of a death benefit.

III.

THE CLAIMANT JOHN GARY ROSS IS NOT INCLUDED IN THE CLASS OF PERSONS ENTITLED TO PAYMENT OF A DEATH BENEFIT.

John Gary Ross was born September 2, 1947, which lacks but one month of being four years after the date of injury. Everything that has been said above with respect to the ineligibility of Lois G. M. Ross for a death benefit, by reason of the fact that she was not a dependent of the injured employee as of the time of injury, applies with equal force to John Gary Ross.

There appears to be but one reported case involving a claim for a death benefit under a compensation law of a child born after the date of injury and prior to the date of death; namely, *Magma Copper Company v. Naglich,* 60 Ariz. 43, 131 Pac. (2d) 357. In that case the employee was injured on February 12, 1940. He was married at the time but had no children. He died on January 21, 1942, leaving his wife and a child born in 1941 surviving him. The Court held that the child was not entitled to a death benefit, saying:

> "In view of the language of our statute and our decisions that the wife and children of a deceased employee do not take by virtue of their relationship, but of their dependency, we hold that under the statute the question of dependency is irrevocably fixed as of the date of the injury, and not the date of the death, and that since Norma Ree Ione Naglich not only was not born but was not conceived at the time of the injury, she could not have then been a dependent, present or prospective, upon her father for support, and is not entitled to compensation because of his death."

We submit that the reasoning of the Court in the Arizona case is sound and should be followed in this case.

CONCLUSION.

It is respectfully submitted that the order dismissing the complaint for injunction should be reversed and the case be remanded to the District Court with instructions to grant an injunction against the enforcement of the Compensation Order—Award of Death Benefit entered by the deputy commissioner.

Dated, San Francisco, California,
May 3, 1950.

Respectfully submitted,
LEONARD, HANNA & BROPHY,
EDMUND D. LEONARD,
IVAN A. SCHWAB,
Attorneys for Appellants.